seisor's possession gives him a right of action in ejectment against one by whom he in turn has been ousted.[24] The requirement, then, of any privity beyond mere continuity seems unwarranted,[25] except on the supposition, which seems to suggest the only explanation of the privity doctrine, that the emphasis is now laid upon a long and meritorious possession rather than on the demerit of the claimant as at common law.

In a recent Michigan case, *Sheldon* v. *Mich. Cent. R. Co.* (1910) 126 N. W. 1056, the railroad fenced in only twenty to thirty feet of a right of way extending fifty feet on each side of the center line of its track. The remaining twenty to thirty feet was occupied for less than the statutory period by each of the successive owners of an adjoining tract, the tenancies of the last two alone amounting together to more than the statutory period. The whole right of way, however, was excepted in the conveyances from each to his successor. The possession of each occupant being adverse to the railroad's title,[26] there was no hiatus, and the court, being evidently bound by no authority in the state,[27] was free to adopt the better rule by declaring that the railway's claim was barred under the Statute of Limitations. The majority, however, assumed that privity was requisite, and held that as to the disputed strip there was in fact no such privity. In the words of a case cited in the majority opinion, the claimant, it would seem, showed that in fact, "the possession of the disputed strip was delivered to him as a part of the land sold and conveyed."[28] Upon the ground, then, that privity is not essential, and perhaps upon the further ground that if required it was in fact present, the decision seems to be open to criticism.

RIGHTS AND LIABILITIES OF THE UNDISCLOSED PRINCIPAL.—It is a fundamental principle of the law of contracts, that a promise from A to B, induced by a consideration, is enforceable only by B the promisee against A the promisor.[1] Yet if B was acting for a principal Y but did not disclose the fact of the agency, the law would allow Y to sue upon the contract in his own name;[2] and if A were likewise acting for an undisclosed principal X, Y might have his action against X to recover damages for the breach of the agreement made by A with B.[3] It is evident that this rule is inconsistent with the theory, that a party

[24]Asher *v.* Whitlock *supra;* Ames, Disseisin of Chattels *supra* 325, note.

[25]Ames, Disseisin of Chattels *supra.* 325.

[26]See Crary *v.* Goodman (1860) 22 N. Y. 170; Grube *v.* Wells (1871) 3 Gray Cas. 85, note.

[27]No authority is cited.

[28]Humes *v.* Bernstien (1882) 72 Ala. 546.

[1]Anson, Contracts (8th ed.) 275.

[2]Sullivan *v.* Schailor (1898) 70 Conn. 733; Buchanan *v.* Cleveland Linseed Oil Co. (1898) 91 Fed. 88; Prichard *v.* Budd (1896) 76 Fed. 710; Propeller Tow-Boat Co. of Savannah *v.* Western Union Telegraph Co. (1905) 124 Ga. 478. See Noel *v.* Atlas Portland Cement Co. (1906) 103 Md. 209.

This rule does not apply to sealed instruments. Van Dyke *v.* Van Dyke (1905) 123 Ga. 686.

[3]See Higgins *v.* Senior (1841) 8 Mees. & W. 834. Suits by the third party against the undisclosed principal were maintained in Lindeke Land Co. *v.* Levi (1899) 76 Minn. 364; Phillips *v.* International Text Book Co. (1904) 26 Pa. Super. Ct. 230; Greenberg *v.* Palmieri (1904) 71 N. J. L. 83; Kayton *v.* Barnett (1899) 116 N. Y. 625.

may determine with whom he will contract and cannot have another person thrust upon him without his consent.[4] Nevertheless, the rule of law that confers on the undisclosed principal the rights, and subjects him to the liabilities of the contract made for his benefit by an authorized agent, is defensible on grounds of justice and policy.[5] Certainly it seems just and politic that the person who was the prime cause of the inception of the contract and who has received or expects to receive its benefits, should be ultimately responsible for its performance. But the propriety of subjecting an undisclosed principal to the liability of a contract which is not only unauthorized but expressly prohibited, is not as apparent. That such a liability exists, however, is the determination of the English Court in the case of *Kinahan & Co. Ltd.* v. *Parry and others* (1910) 102 L. T. 826, where the owners of a hotel were adjudged liable for the price of whiskey purchased by their manager in contravention of their instructions, on the theory, apparently, that once the relation of principal and agent is established, the same rights and liabilities attach and the same rules of law operate, as in the case of a disclosed principal.[6]

Even if the position of an undisclosed principal upon discovery of the agency is considered as assimilated to that of the disclosed principal, the result reached by the court would not necessarily follow from that fact alone. The liability of the disclosed principal on a contract made by his authorized agent, rests in the intention of all the parties that he should be bound.[7] The agent is legally the mechanical contrivance by means of which the minds of the principal and of the third party meet.[8] When, however, the agent oversteps his authority it is clear that there can be no such meeting of the minds. In such circumstances the liability of the principal depends not on the law of contracts, nor on the law of agency, but on the theory of estoppel.[9] If the principal has clothed the agent with such apparent authority that the third party was justified in assuming that he had power to act in the particular transaction then the principal will not be heard to say that he had not authorized the contract.[10]

Where the fact of the agency is concealed, the situation is essentially different. The only contract, in strict legal theory, being between the agent and the third party,[11] the undisclosed principal can sue and be sued in assumpsit, only by the introduction of a fiction that since the mind of the agent is the mind of the principal, the contract is the contract of the principal.[12] Where, however, the agent was forbidden

[4]Boston Ice Co. *v.* Potter (1877) 123 Mass. 28.

[5]See opinion of Lindley J. in Keighley etc. Co. *v.* Durant L. R. [1901] A. C. 240. See James Barr Ames, Undisclosed Principal—His Rights and Liabilities 18 Yale Law Jour. 443.

[6]Watteau *v.* Fenwick (1893) 1 Q. B. 346.

[7]See Story, Agency (8th ed.) 512.

[8]See Spooner *v.* Browning [1898] 1 Q. B. 528; Huffcut, Agency (2nd ed.) 128.

[9]Huffcut, Agency (2nd ed.) 129.

[10]Johnson *et al. v.* Hurley (1893) 115 Mo. 513; Clark & Skyles, Agency 1000; Huffcut, Agency (2nd ed.) 128, 129.

[11]Huffcut, Agency (2nd ed.) 161.

[12]Kayton *v.* Barnett *supra;* Clark & Skyles, Agency 1008; O. W. Holmes Jr., The History of Agency, 4 Harv. L. Rev. 345, 5 Harv. L. Rev. 1. See, however, article by William Draper Lewis 9 COLUMBIA LAW REVIEW 116, 127-135.

to enter into the agreement, the fiction of identity of mind is incompatible with the fact of prohibition, and the liabilities of the undisclosed principal, like that of a disclosed principal whose agent has exceeded his authority, is to be supported, if at all, upon the theory of estoppel. That this theory is inapplicable to the ordinary case of undisclosed principal is evident, because neither the principal nor the agent has by word or conduct made any representation upon which the third party had reason to rely and which must be repudiated in order that the principal shall not be held liable upon the contract.[13] It would seem, therefore, that since the facts necessary to constitute an estoppel are wanting, the rule that the principal is liable upon all contracts made within the apparent scope of his agent's authority would lose its justification where the fact of the agency is not disclosed. In arriving at the opposite conclusion, the English Court[14] has failed to apply the rule with due regard to its underlying principles and, although the result may perhaps be in accordance with the conception of justice and policy which supports the general liability of the undisclosed principal, the decision is insupportable upon strict theory.

RIGHTS OF A MORTGAGEE AGAINST A GRANTEE WHO ASSUMES PAYMENT OF THE MORTGAGE DEBT.—In determining the principles upon which to base the rights of a mortgagee against one who, upon a conveyance of the mortgaged premises, assumes payment of the mortgage debt, the courts are not in accord. Thus, in some jurisdictions the mortgagee may proceed directly against the grantee at law,[1] while in others he is permitted to avail himself of the promise only by way of the equitable doctrine of subrogation.[2]

The former of these views being a direct application of the doctrine which allows a third person to sue on a contract, although he is a stranger both to the promise and to the consideration, finds no justification, whatever the true theory of assumpsit,[3] in the law of pure contracts, and with a single exception, long since overruled,[4] this has always been recognized in England.[5] In this country, however, probably because of the influence exerted by arguments of justice and expediency,[6] the courts, excepting only those of Massachusetts,[7] recog-

[13]"In making the contract the agent has said: 'I am responsible.' This is not a misrepresentation; he is responsible." 9 COLUMBIA LAW REVIEW 121.

[14]Kinahan *v.* Parry *supra;* Watteau *v.* Fenwick *supra; cf.* Daun *v.* Simmons (1879) 41 L. T. 783.

[1]Kramer *v.* Gardner (1908) 104 Minn. 370; Dean *v.* Walker (1883) 107 Ill. 540; Gifford *v.* Corrigan (1889) 117 N. Y. 257.

[2]Keller *v.* Ashford (1890) 133 U. S. 610.

[3]Wald's Pollock on Contracts (3rd ed.) 241; Ames, History of Assumpsit 2 Harv. L. Rev. 14; Langdell, Summary of Contracts §§ 45, 46, 63.

[4]Dutton *v.* Poole (1677) 2 Lev. 210; Tweddle *v.* Atkinson (1861) 1 B. & S. 392.

[5]Price *v.* Easton (1833) 4 B. & A. 433; *In re* Chemical Co. (1883) L. R. 25 Ch. D. 103.

[6]Professor Williston in Wald's Pollock on Contracts (3rd ed.) 242.

[7]Bank *v.* Rice (1871) 107 Mass. 37; Mellen *v.* Whipple (Mass. 1854) 1 Gray 317; Marston *v.* Bigelow (1889) 150 Mass. 45; Borden *v.* Boardman (1892) 157 Mass. 410. But see Bank *v.* Insurance Co. (1896) 166 Mass. 189.